

United States
Circuit Court of Appeals
For the Ninth Circuit.

NATIONAL SURETY COMPANY, a Corpora-
tion,

Plaintiff in Error,

vs.

COUNTY OF LINCOLN,

Defendant in Error.

Supplemental Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Montana.

**In the District Court of the United States for the
District of Montana.*

LINCOLN COUNTY,

Plaintiff,

VS.

NATIONAL SURETY COMPANY, a Corporation
et al.,

Defendants.

Bill of Exceptions.

BE IT REMEMBERED, that the above-entitled cause came on regularly for trial on the 27th day of January, 1916, before the above-entitled Court, Honorable George M. Bourquin, United States District Judge for Montana, presiding,—a jury having been waived by written stipulation,—Sidney M. Logan, W. H. Poorman and James M. Blackford, appearing as attorneys for the plaintiff, and M. S. Gunn, Carl Rasch and Clarence H. Gilbert, appearing as attorneys for the defendant, National Surety Company, whereupon the following proceedings were had and evidence introduced, to wit:

Pursuant to stipulation of the parties permission was granted the plaintiff by the Court to amend the fourth paragraph of the complaint by alleging that the original contract was made on the 18th day of December, 1911, and the agreement modifying same on the 5th day of February, 1912, thereby making the original contract and the agreement of February

*Supplemental Transcript of Record Substituted for Bill of Exceptions
appearing in Original Certified Transcript of Record.

5, 1912, exhibit "A" to the complaint.

The attorneys for the defendant, National Surety Company, thereupon objected to the introduction of any evidence on the part of the plaintiff in support of its complaint as amended upon the ground that the complaint does not state facts sufficient to constitute a cause of action, which objection was overruled by the Court and an exception noted.

Testimony of Louis J. Klenck for Plaintiff.

Thereupon LOUIS J. KLENCK, a witness called and sworn in behalf of the plaintiff testified as follows:

Direct Examination.

My name is Louis J. Klenck. I am, and have been since the first day of January, 1915, county clerk and recorder of Lincoln County. During the years 1911, 1912, 1913 and 1914 I was deputy county clerk and recorder of said county. I have with me and now produce the contract between the Coast Bridge Company and the County of Lincoln, dated the 18th day of December, 1911, and the plans and specifications referred to therein.

Thereupon the contract was offered and received in evidence as Plaintiff's Exhibit 1, the specifications were offered and received in evidence as Plaintiff's Exhibit 2, and the plans were offered and received in evidence as Plaintiff's Exhibit 3.

Said contract, Plaintiff's Exhibit 1 is as follows:

Plaintiff's Exhibit 1—Agreement, December 18, 1911, Between Coast Bridge Co. and County of Lincoln.

“THIS AGREEMENT, Made the 18th day of December, one thousand nine hundred and eleven, between the Coast Bridge Company, a corporation, hereinafter known as the Bridge Company, party of the first part, and the County of Lincoln, hereinafter known as the County, acting through its Board of County Commissioners, party of the second part, WITNESSETH:

The Bridge Company does hereby promise and agree, with and to the County, for the consideration hereinafter mentioned, that it will well and truly build, erect and finish the bridge hereinafter described, conformable to the plans and specifications herein specifically referred to and attached hereto and made a part of this contract, within the time named herein, in good, workmanlike and substantial manner, and also shall and will find and provide labor and good and sufficient materials of all kinds whatsoever as shall be proper and sufficient for the construction and completion of said bridge and all its parts so as to make it a perfect bridge, according to the plans and specifications aforesaid, and all the provisions of this agreement for the sum of Twenty-four Thousand Two Hundred Fifty-two 00/100 Dollars (\$24,252.00/00).

And the said County does hereby promise and agree with and to the Bridge Company that when said bridge is completed, the County will, in consid-

eration of the covenants and agreement being strictly performed and kept by the Bridge Company as specified herein, well and truly pay, or cause to be paid unto the Bridge Company the said sum of Twenty-four Thousand Two Hundred Fifty-two 00/100 Dollars in the manner following:

Upon the completion of the concrete piers, twenty-five per cent of the above-mentioned price. Upon the arrival of the steel for said bridge at the bridge site, fifty per cent of above mentioned price. Upon the completion of the bridge, the remaining twenty-five per cent of the above mentioned price within thirty days after acceptance of the bridge by the County.

The Bridge Company promises and agrees to furnish all material fabricated and erected for a two-span riveted bridge over the Kootenai River at Rexford, Montana, together with three concrete piers; also the lumber and railings for said spans and all other material, as per plans and specifications above referred to and hereto attached.

INSERT. It is further Agreed and Understood: that the Bridge Company shall be allowed by the County the sum of Five (5) Dollars per lineal foot for the pile of trestle approaches to this bridge; the length of same to be determined by the County or its representative.

The Bridge Company promises and agrees to furnish and construct in place any additional concrete required in the said piers below water for fifteen dollars per cubic yard, and any additional concrete required in said piers above water for ten dollars per

cubic yard. It is further agreed and understood that, should the County deduct any concrete from said piers, which is hereby made optional with said County, the Bridge Company will allow the County the sum of Thirteen Dollars per cubic yard for all concrete so deducted below water and the sum of Eight Dollars per cubic yard for all concrete deducted above water. It is further agreed and understood that, should piling be required under any of the piers, the price to be paid for said piling shall be forty cents per lineal foot, and the length of such piling shall be specified and determined by the County or its representative.

The Bridge Company hereby covenants and agrees and promises to and with the County to build the said bridge and all its parts in accordance with the plans, drawings and specifications hereto attached and made a part of this contract, designated as Plan "A," Sheets Nos. 1 and 2, covered by Bid Number 1, submitted by the Coast Bridge Company to the Board of County Commissioners of Lincoln County, Montana, on December 16, 1911, specifications entitled, "Specifications for a Steel Highway and Bridge and approaches over the Kootenai River near Rexford, Montana."

The Bridge Company promises and agrees to begin the construction of said bridge on or before the first day of August, 1912, and to complete the construction of said bridge on or before the first day of February, 1913.

The Bridge Company promises and agrees to furnish an indemnity bond in the sum of Thirty Thou-

sand no/100 Dollars (\$30,000.00/00), with the National Surety Company as surety thereon, for the faithful performance of this contract, and such bond shall be accepted by the County before this contract shall be in force and effect.

It is further agreed and understood by and between the parties hereto that this contract shall not take effect until the War Department of the United States has approved the plans and specifications and granted permission for the construction of said bridge, and the authority for the construction of the same shall have been granted by the Congress of the United States.

It is further agreed and understood by and between the parties that active construction of the work on the said bridge shall not begin until certain funding bonds for the construction of a system of highways and bridges and free ferries, including the said bridge, issued by said County, shall be sold and the money from the same received by the said County.

It is further understood and agreed by and between the parties that, should the Bridge Company be delayed in the construction of said bridge through the delay of delivery of materials at the bridge site, through the failure of any railroad to transport any portion of the same within a reasonable time, or by strikes, *lookouts*, or any other cause or causes beyond the reasonable control of the Bridge Company, then the time for the delivery of such material shall be extended for a period equivalent to such delay or the sum of all such delays.

The Bridge Company agrees and promises to sub-

mit to the County for approval the shop drawings of the steel parts and members of the said bridge.

And it is further agreed by and between the said parties:

First: The specifications and drawings are intended to co-operate, so that any works exhibited in the drawings and not mentioned in the specifications, or vice versa, are to be executed the same as if it were mentioned in the specifications and set forth in the drawings, to the true meaning and intention of the said drawings and specifications.

Second: The Bridge Company, at its own proper cost and charges, is to provide all material, labor and other things of every description, for the performance of the several erections.

Third: Should the County, at any time, order alterations, deviations, additions, or omissions not hereinabove provided for, from the said contract, specifications or plans, it shall be at liberty to do so, and the same will be added to or deducted from the amount of the said contract price, as the case may be, by a fair and reasonable valuation.

Fourth: Should the Bridge Company, at any time during the progress of said works, refuse or neglect to supply a sufficiency of materials or workmen, the County shall have power to provide materials and workmen (after three days notice in writing given) by leaving the writing at the last known residence or place of business of the contractor, and to finish said works, and the expense of finishing said works shall be deducted from the amount of the said contract price.

Fifth: Should any dispute arise respecting the meaning of the drawings of specifications, the same shall be decided by the County or its representative, and its or his decision shall be final; but should any dispute arise as to the value of the extra work or works omitted, the same shall be valued by two men—one selected by the County and the other by the Bridge Company—and in case they cannot agree, these two shall have the power to name an umpire, whose decision, if agreed to by one of the two, shall be final.

Sixth: The County shall not, in any manner, be answerable or accountable for any loss or damage that shall or may happen to the said works, or for any part or parts thereof respectively, or for any of the materials or other things used and employed in finishing and completing the same.

Seventh: All payments shall be as above agreed upon, and this contract is completed when the work is finished in accordance with the original plans as modified by alterations of the original plans, if there be any such, and the acceptance of the bridge by the County.

IN WITNESS WHEREOF, the said County of Lincoln, State of Montana, has caused these presents to be signed in its name and behalf by the Board of County Commissioners of said County, and attested by the County Clerk, and the said Coast Bridge Company has caused these presents to be signed in its name and behalf by its president and its secretary

the day and year herein first above written.

LINCOLN COUNTY, MONTANA.

By PAUL D. PRATT,

Chairman Board of County Commissioners.

J. P. BARTLETT,

Commissioner.

[Seal]

F. B. CAREY,

Commissioner.

COAST BRIDGE COMPANY,

By JOHN P. WHITLOCK,

President.

GEO. A. SEARS,

Secretary.”

Attest by:

SAMUEL CARPENTER,

County Clerk.

Said specifications, Plaintiff’s Exhibit 2, are as follows:

Plaintiff’s Exhibit No. 2—Specifications for a Steel Highway Bridge and Approaches Over the Kootenai River.

“SPECIFICATIONS

For a Steel Highway Bridge and Approaches
Over the Kootenai River

Near Rexford,

Lincoln County, Montana.

Specifications referred to in contract of date Dec. 18th, 1911, for a bridge at Rexford, Mont., between Lincoln County, Mont., and Coast Bridge Co.

[Seal]

PAUL D. PRATT,

Chairman Coast Bridge Co.

By GEO. A. SEARS,

Vice-Pres.

SPECIFICATIONS.

General Description.

The work covered by these specifications and accompanying plans contemplate the manufacture and erection of a steel highway bridge on steel tubular piers or concrete piers, over the Kootenai River near Rexford, Lincoln County, Montana.

Accompanying Plans.

The accompanying plans show two general designs for the crossing of the Kootenai River at Rexford, Montana, and will be known as plan "A" and Plan "B."

PLAN "A."

Sheet 1.

Sheet 1 shows the profile of the Kootenai River near Rexford, Montana, at the proposed site of the bridge.

The proposed crossing shown on this sheet *suggest* 2-200' Riveted Spans for a superstructure, resting on one stream pier and two shore piers, together with the necessary wooden approaches.

On this sheet is also shown the detail dimensions for the concrete piers, or tubular piers if so desired; and a cross section of the pile approach.

Sheet 2.

Sheet 2 shows the strain sheet and the sizes and makeups of all of the members of the steel work of a 200' riveted type of span suggested for the two spans of this crossing.

There is also shown a cross section of the span at the center, and *on* end view of the span showing the sizes and arrangements of the wind or lateral bracing.

This cross section also shows the clearances and the arrangement and sizes of the floor system and rail.

Sheet 3.

Sheet 3 shows a strain sheet for a 200'-0" pin-connected span as an alternate plan from the strain sheet shown on Sheet 1.

This sheet also shows a cross section and portal showing the arrangements of the lateral or wind system, and the sizes and arrangements of the floor and rail.

PLAN "B."

Plan B contemplates a one span crossing with the necessary approach, across the River at this same point.

Sheet 1.

Sheet 1 shows a profile and general layout of one 352' span and the necessary foundations and approach.

This sheet also shows the detail dimensions of the concrete piers contemplated and also the detail dimensions of tubular piers, if so desired.

The cross section of the pile approach showing the arrangement of the woodwork is also given.

Sheet 2.

This sheet shows the strain sheet and sizes and makeup of all of the members of the 352' pin-connected span; a cross section at the center of the span, and an end view of the span shows the arrangements of sizes and wind *bracking*; also of the floor system and rail.

DRAWINGS.

These specifications and the accompanying drawings are intended to describe and provide for the completed work. They are to be co-operative, and what is called for by either is as binding as if called for by both.

The work therewith described is to be complete in every detail, notwithstanding that every item involved is not particularly mentioned.

The contract price as set forth in the proposal is based on the intent of these specifications, and the accompanying plans, and a copy of same will be attached and be considered part of the specifications and accompanying plans.

FLOOR SYSTEM.

The floor stringers underneath the roadway on the approaches and spans shall consist of ten lines of 4"x14" joists except where the panel length exceeds 20'; when the joists shall be increased in size 4"x16". These joists shall be of such length that they shall overlap the floor beam and caps at least 6". They shall preferably be surfaced one edge to even width; and if not they shall be *clapped* over the floor beams $\frac{1}{3}$ " to give an even bearing. The outside joists shall make butt joint so as to be in perfect alignment for the bolting of the end rail posts. There *shall* a line of 3x6 bridging at center of each panel both on spans and approaches. The floor shall consist of 4x12" plank, 12' long, laid tight and neatly trimmed to even length. They shall preferably be surfaced one side to even thickness and laid with the smooth side down. Each plank shall be spiked with one 7" wire spike

at each intersection of the intermediate joist and by two 7" spikes to the outside joists.

Rail and Guards.

On the east side of the roadway of the span and approaches there shall be a 4x6 wheel guard fastened through and into the outside line of joists by a 5/8"x13" lag screw, having a malleable washer under head. These lag screws shall be spaced about 6' apart.

There shall be a wooden hand rail on both sides of the roadway extending from end to end of the bridge and approaches, and consisting of two lines of 2x6, and one line of 3x10, sufficiently spiked to 4x6 posts; which in turn are to be bolted by 2 1/2" bolts with malleable washers underhead; and nut; to the outside joists. There shall be three posts to each panel of floor system; or they shall be spaced about 6' center to center. Along the center of the roadway there shall be a 6x8 guard timber dividing the roadway into two parts. This guard shall be bolted through the floor to timber washers underneath; with 1/2" bolts. This line of guard timber shall extend from end to end of the steel work and as far on the approaches as may be necessary; to keep the travel on the right side of the bridge in crossing. All guard rail, hand rail posts and hand rail shall be surfaced four sides. Hand rail posts shall be cut of such length that the height of the hand rail above the finished floor shall be at least 3' 6". After completion of the hand rail, posts and stringers of same shall receive two good coats of paint; of a color which may be selected later.

APPROACHES.

The wooden approaches to the spans shall rest on pile bents. These bents shall consist of four piles spaced transversely; 5' 6" center to center. They shall be capped with a 10x12", 20' cap, drift bolted to each pile with a $\frac{3}{4}$ x22" round drift bolt. Each bent shall be swayed with two $\frac{3}{8}$ " sways bolted to the cap and to each pile with a $\frac{5}{8}$ " machine bolt. All bolts shall have the proper malleable washers under head and nut.

All approaches to spans shall be of such length as the local engineer may designate, but no approach shall have a grade greater than five per cent. On the approaches on the hill side of the Libby and Troy bridges there shall be wider approaches, so as to make an easy turn from the approaches, to the new road grade. These approaches shall have the piles and caps and joists called for on the accompanying plans.

SPECIFICATIONS FOR MATERIAL.

Cement.

All cement used shall be one of the standard brands of Portland cement, and must be of such quality as to pass the test adopted as standard by the American Society of Civil Engineers.

Sand.

The sand shall be coarse, clean and sharp and must be free from loam, earth or other foreign matter of any kind, in excess of five per cent, by volume.

Gravel.

The gravel used in the concrete for the abutments, piers and for filling the tubes, shall be thoroughly

cleaned from dust, earth or other objectionable matter, and shall vary in size from $\frac{3}{8}$ " to 2" in greatest diameter.

Concrete.

Concrete shall be of the following proportions:

To each barrel or four bags of cement shall be 12 cubic feet of sand and 22 cubic feet of gravel of the quality given above. Concrete shall preferably be machine mixed, but if mixed by hand the following method shall be employed. It shall be mixed on a close board platform. The material for each batch must be carefully measured to insure the correct proportions. The sand and cement shall be evenly spread and then thoroughly mixed by turning over with hoes or shovels before wetting; they should be then wetted and worked to a soft mortar; then the proper amount previously drenched with water, should be spread over mortar and well incorporated with same by turning the whole over at least three times with shovel or hoes. It should be of the consistency known as wet concrete, and require but little ramming in the forms when laid in layers not thicker than nine inches.

Lumber.

All lumber used shall be native lumber, sound, reasonably well seasoned, free from loose or rotten knots, wind shakes, splits or other defects that would impair its strength or durability. All lumber for the hand rail and guards shall be surfaced four sides.

Paint.

All paint used in this work in shop or field shall

be one of the standard brands of graphite, mixed with pure linseed oil.

Piles.

Piles are to be cut from live trees, and not to be less than 12" at the large end and not less than 9" at the small end. They shall be stripped from all bark; be straight and sound and free from wind shakes. If found necessary in driving, all piles shall be shod with steel or cast-iron shoes to prevent their splitting or crushing under rapid blows of the hammer.

Hardware.

All hardware shall be first class in every respect and of standard sizes and make, and shall be used as called for on the plans in these specifications.

Steel Work.

All steel work shall be as per the standard specifications, and shall conform to the requirements of the standard specifications of the American Bridge Company of New York.

COAST BRIDGE COMPANY SPECIFICATIONS FOR MATERIAL AND DE- TAILS FOR THE MANUFACTURE OF STEEL HIGHWAY BRIDGES.

SPECIFICATIONS FOR MATERIAL.

Steel.

All steel used in the construction of these bridges shall conform to the manufacturer's standard specifications for medium and rivet steel, as published in the 1913 Hand Book of the Carnegie Steel Company.

PROPORTION OF PARTS.

All parts of the structure shall be proportioned by the following unit strains:

Lateral bracing per square inch.....	18,000	lbs.
Bottom <i>fange</i> of riveted girders, net section.....	14,000	“
Solid rolled beams, used as floor beams or stringers.....	16,000	“
Floor beam hangers.....	8,000	“
Counters and long verticals, forged bars..	12,000	“
Counters and long verticals, plates and shapes.....	11,000	“
Bottom chords and main diagonals, eye bars.....	15,000	“
Bottom chords and main diagonals, plates and shapes.....	14,000	“
Shear on web plates of girders.....	8,000	“
Shear on pins and rivets.....	10,000	“
Bending on pins.....	25,000	“
Bearing projected and semi-intrades....	16,000	“

For rivets in floor system, deduct 20% from the above unit strains.

For rivets in lateral system, add 20% to above unit strains.

For rivets hand-driven or bolts used in field erection, add 25% to the number obtained as above.

In members subject to tension strains, full allowance shall be made for reduction of section by rivet holes.

Compression members shall be proportioned by the following allowed unit strains:

Square Ends. 12,500	Pin and Square Ends. 12,500	Pin Ends. 12,500
2	2	2
(L)	(L)	(L)
1+	1+	1+
2	2	2
36,000R	24,000R	18,000R

where L equals the length of the member in inches and where R equals the least radius of gyration of the member.

STEEL ROLLERS.

Shall be proportioned by the formula $600V/d$ for allowed unit strains per lineal inch of rollers, where d is the diameter of the rollers in inches.

LATERAL STRUTS.

Lateral Struts shall be proportioned by the above formula to resist the resultant due to an assumed initial strain of 10,000 lbs. per square inch upon all the rods attaching to them assumed to be produced by adjusting the bridge or to greatest strain from wind in one direction.

LENGTH.

No compression member shall have a length exceeding sixty times its least width, nor 120 times its least radius of gyration for main members nor 150 times its least radius of gyration for bracing.

FLANGES.

In riveted beams and plate girders the compression flange shall be made of the same gross section as the tension flanges.

Rolled beams shall have generally a depth of not less than $1/15$ of the span.

ALTERNATE STRAINS.

Members subject to alternate strains of tension and compression shall be proportioned to resist each kind of strain. Both of the strains, however, to be considered as increased by an amount equal

to 8/10 of the least radius of the two strains for determining the sectional areas by the above allowed unit strains.

DETAILS OF CONSTRUCTION.

Details.

All the connections and details of the several parts of the structure shall be of such strength, that upon testing, pressure will occur in the body of the members rather than in any of their details or connections.

Preference shall be had for such details as shall be most accessible for inspection, cleaning and painting; no closed sections will be allowed.

The pitch of rivets in all classes of work shall never exceed 6 inches, or sixteen times the thinnest outside plate, nor be less than three diameters of the rivet.

The rivets used shall generally be $\frac{5}{8}$, $\frac{3}{4}$ and $\frac{7}{8}$ inch diameter.

The distance between the edge of any piece and the center of a rivet hole must never be less than one inch, except for bars less than 2 inches wide; when practicable, it shall be at least two diameters of the rivet.

For punching, the diameter of the die shall in no case exceed the diameter of the punch by more than 1/16 of an inch, and all holes must be clean cut without torn or ragged edges.

All rivet holes must be accurately spaced and punched so that when the several parts forming one member are assembled together, a rivet 1/16 of an inch less diameter than the hole can generally be

entered hot, into any hole, without reaming or straining the metal by "drifts"; occasional variations must be corrected by reaming.

The rivets when driven must completely fill the holes, the rivet heads must be round and of uniform size for the same sized rivets throughout the work. They must be full and neatly made and be concentric to the rivet hole and thoroughly pinch the connected pieces together.

Wherever possible, all rivets must be machine driven. The machine must be capable of straining the applied pressure after the upsetting is completed.

Field riveting must be reduced to a minimum or entirely avoided where possible.

The effective diameter of a driven rivet will be assumed the same as its diameter before driving. In deducting the rivet holes to obtain net sections in tension members, the diameter of the rivet holes will be assumed as $\frac{1}{8}$ inch larger than the undriven rivets.

For main members and their connections, no material shall be used of a less thickness than $\frac{1}{4}$ of an inch, and for laterals and their connections, no material less than $\frac{3}{16}$ of an inch in thickness; except for lining or filling vacant spaces.

The heads of eye bars shall be so proportioned and made that the bars will preferably break in the body of the original bar rather than at any part of the head or the neck. All bars 3" in width or more shall be die forged.

The bars must be free from flaws and of full thickness in the necks. They shall be perfectly

straight before boring. The holes shall be in the center of the head, and on the center line of the bar.

The bars must be bored to length not varying from the calculated lengths more than $1/64$ of an inch for each 25 feet of total length.

The lower chord shall be packed as narrow as possible.

The pins shall be turned straight and smooth; chord pins shall fit the pin holes within $1/32$ of an inch.

All bars with screw ends shall be upset at the ends, so that the diameter at the bottom of the threads shall be $1/16$ inch larger than any part of the body of the bar. Where closed sleeve nuts are used on adjustable members, the effective length of the thread shall be legibly stamped at the screw ends of each bar.

All threads must be United States standard, except at the ends of the pins.

The pitch of rivets at the ends of compression members shall not exceed four diameters of the rivets for a length equal to twice the width of the member.

The open sides of all compression members shall be stayed by batten plates at the end and diagonal lattice work at intermediate points.

All bed plates must be of such dimensions that the greatest pressure upon the pedestal stone shall not exceed 250 lbs. per square inch.

All bridges over 100 feet span shall have turned friction rollers running between planed surfaces. These rollers shall not be less than $27/8$ inches diameter for spans 100 feet, and for greater spans,

this diameter shall be increased in proportion of one inch for 100 feet additional. Bridges 100 feet and less in length, one end shall be free to move on smooth surfaces. Allowance should be made for an expansion and contraction corresponding to a variation of 150 degrees Fahrenheit, in temperature.

SHOP PAINTING.

All iron work before leaving the shop shall be thoroughly cleaned from all loose scale and rust, and be given one good coating of graphite paint, well worked into all joints and open spaces.

In riveting work, the surfaces coming in contact shall each be painted before being riveted together.

Pieces which are not accessible for painting after erection shall have two good coats of paint.

The paint shall be of good quality of graphite mixed with pure linseed oil, or such as may be specified in the contract.

Pins, pin holes, screw threads and other finished surfaces shall be coated with white lead and tallow before being shipped from shop.

EXCAVATION.

FOR PIERS AND ABUTMENTS.

The piers and Abutments shall be sunk to the elevation called for on the plans. These shall be made within a timber cofferdam: or by any other means which the contractor may see fit to use in order to reach the desired depth and to conform to the dimensions shown on the plans of these foundations.

After excavation is made to the full depth; piles shall be driven inside, if so ordered by the Engineer. They shall be cut off at an elevation of about 24"

above the bottom of the concrete piers and abutments, and about 6' above the bottom of the steel work if tubular piers are used. These foundations shall be then tamped out and filled with concrete, as specified under concrete.

If steel tubes are used, the upper foot of the top of the tubes shall be made of concrete in the proportion of one, two and four.

All bed plates resting upon the concrete work shall be set on small metal wedges, leveled to the proper elevation and thoroughly grouted with cement mortar in the proportion of one of cement to two of sand, in order that they may have an even bearing throughout.

Forms.

The concrete of the piers and abutments shall be cast within suitable molds. These molds shall be built of lumber, sized to an even thickness and width and finished on the interior in a workmanlike manner, in order to give good finish to the completed concrete. These molds or forms shall be of such size and dimensions that the concrete piers and abutments shall conform to the sizes and dimensions shown on the accompanying plans.

All forms shall be built of good sound lumber and shall be properly pressed and tied together by wire ties, in order that there may be no spreading when the concrete is poured. These forms shall not be removed until at least five days after the concrete has been pressed.

ERECTION.

Pile Driving.

All piles shall be as called for under specifications

and shall be of the length called for on the plans or of a length necessary to fulfill the following specifications as to driving:

Piles shall be driven with a hammer weighing not less than 2000 lbs. The penetration under the last blow of the hammer falling twenty feet shall not exceed one-half inch. If necessary they shall be shod with steel or cast-iron shoes and properly ringed at the top with a wrought iron ring, to prevent their splitting or brooming. All piles which are broken, split or badly broomed and in the opinion of the engineer are not satisfactory, must be withdrawn and replaced by other piles to the satisfaction of the engineer or inspector in charge.

Steel Spans.

The contractor shall furnish all staging and false work, shall erect and adjust all metal work, place all posts, chords, struts, stringers, floor plank, guards and rail complete as shown on plans and specifications. He shall anchor the spans with proper anchor bolts, fox-bolted to the concrete and set with Portland cement.

Such false work shall be used as in the opinion of the engineer shall permit of no unnecessary risk of accident to the men and material. After the span has been swung and before the floor has been placed, all work shall be thoroughly and evenly painted with one additional coat of paint, as was used in the shop. All recesses which will retain water or through which water can enter, must be filled with thick paint or some water-proof cement.

Field Rivets.

All riveted field connections must be made in the best possible manner. The heads shall be similar to those shown in shop driven rivets. The rivets must be heated uniformly the entire length and when driven they must completely fill the holes. While a workmanlike finish is desired, it must be remembered that the item of prime importance is that the rivet shall be well set up the entire length of the hole. Rivets with cracked heads or heads not concentric with the axis of holes will not be admitted. All rivet heads and marred surfaces must be touched up with paint before any rust has had time to form or field coat of paint is applied.

Painting.

After the erection of the steel work and before any lumber has been placed on the bridge, all steel work shall be given one complete coat of same kind of paint as was used in the shop.

Final.

All work either described or shown herein shall be executed of good material and in good workmanlike manner and shall be acceptable to the Board of County Commissioners of Lincoln County, Montana, or their duly authorized representative."

Plaintiff's Exhibit 3, said plans, consisting of drawings, are hereby referred to and made a part hereof.

Said witness further testified: I have with me and now produce the contract made in February, 1912, modifying the original contract.

Said contract with the specifications referred to

(Testimony of Louis J. Klenck.)

therein was produced and it was thereupon stipulated that a true and correct copy of same is attached to and made a part of the complaint in this action.

Thereupon the witness further testified: I have with me and now produce the bond executed by the defendant, the National Surety Company.

It was stipulated that a true and correct copy of said bond is attached to and made a part of the complaint in this action.

The witness further testified: The Coast Bridge Company was paid for the bridge constructed at Rexford. There was a claim audited on August 31, 1912, for \$12,500. The records in my office show that the Coast Bridge Company was paid the full contract price.

Cross-examination.

The claim of the Coast Bridge Company for \$12,500 was filed August 31, 1912, and allowed September 3, 1912. The payment of \$12,500 was made in pursuant to a resolution appearing in the minutes of the proceedings of the Board of County Commissioners on page 288 of volume 1.

Thereupon the minutes of the proceedings of the Board of County Commissioners, containing a copy of the resolution and a copy of the acceptance by the Coast Bridge Company, were offered in evidence as exhibit No. 7, to which offer Mr. Logan, one of the attorneys for the plaintiff, objected as follows:

“If the Court please we object to the introduction of the resolution upon the following grounds: First, it is improper cross-examination, second, it is

incompetent, irrelevant and immaterial for any purpose.”

The objection was overruled and the exhibit was received in evidence, and is as follows:

**Defendant's Exhibit No. 7—Minutes of Proceedings
of Board of County Commissioners of Lincoln
County, July 26, 1912.**

“Page 288.

Libby, Montana, July 26, 1912.

Special Meeting of the Board of County Commissioners held July 26, 1912, pursuant to the following call:

A special meeting of the Board of County Commissioners of Lincoln County, Montana, is hereby ordered held July 26, 1912, at 10 o'clock A. M. at the Court House at Libby, Montana, to consider business relating to the contracts of the County with the Coast Bridge Co., for bridges at Troy and Rexford, and for the purpose of making new Contracts between the said parties modifying the old contracts, and for the acceptance and approval by the Board of the plans and specifications for the said bridges, and for the making of payments upon the said contracts, and for the purpose of advertising for bids for a bridge over Tobacco River near the Amile Pijean place, and to provide for the construction of a road on the east side of the Kootenai River from

the Ferry Landing to the mouth of O'Brien Creek.

PAUL D. PRATT,
Chairman.

J. P. BARTLETT,
Commissioner.

F. P. GAREY,
Commissioner.

Present Paul D. Pratt, Chairman, J. P. Bartlett and
F. P. Garey, Commissioners, and Samuel Carpenter, Clerk.

The following resolution was adopted:

RESOLUTION.

Whereas, The Board of County Commissioners of Lincoln County, Montana, did on the 18th day of December, 1911, make, enter into, and execute two certain contracts with the Coast Bridge Company of Portland, Oregon, for the construction, erection and completion of two certain iron and steel bridges, cement piers, over and across the Kootenai River near or at the town of Troy, and one in the vicinity of the Village of Rexford, and,

Whereas: The Board of County Commissioners did on the 26th day of July, 1912, make, enter into, and execute a contract with the said Coast Bridge Company, changing the plans and location of the said bridge to be constructed across the Kootenai River at the Town of Troy, and,

Whereas: The Board of County Commissioners have made certain alterations in the plans of the bridge to be erected across the Kootenai River near the Village of Rexford, and

Whereas: Each of the contracts aforesaid pro-

vided for the payment of certain sums of money upon the completion of certain portions of said work, and

Whereas: By reason of the institution of a certain suit in equity entitled Robert Reid, vs. The Board of County Commissioners of Lincoln County, the construction and erection of each of the said bridges respectively has been delayed because of the failure of the said County of Lincoln to secure funds upon the certain sale of bonds, which said funds was to provide for the payment of the contract price of said bridges, and

Whereas: The Coast Bridge Company have ordered manufactured, steel and iron necessary for the construction of said bridges, which said steel and iron is especially adapted for said bridges, and no other structure, and

Whereas: The Coast Bridge Company has furnished good and sufficient bonds in the sum of

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Sixty-five Thousand Dollars with the National Surety Company of New York, as surety conditioned for the performance of the terms and conditions of each of said contracts, and

Whereas: The Coast Bridge Company are prosecuting said work in the construction of said bridges; therefore,

Be it resolved, that the terms and conditions of each of the said contracts in so far as the payments owing and due under the said contract shall be changed and altered to the following manner:

That there shall be paid out of the Special Bridge and Road Fund upon each of said contracts, upon satisfactory proof being furnished to the Board of County Commissioners, that the Coast Bridge Company have ordered to be fabricated especially for each of said bridges, steel and iron necessary therefor, that upon the completion of the piers necessary for each of said bridges and the delivery of said steel and iron at the bridge site of each of said bridges, there shall be paid to the Coast Bridge Company, out of the special Road and Bridge Fund, of the said County such sums as shall be an amount sufficient in addition to the Twelve Thousand and Five Hundred Dollars to equal seventy-five per cent of the contract price of each of said bridges, and that no further payments be due and payable under said contracts or either of them until the completion of said contracts and the final acceptance of said bridge or bridges by the Board of County Commissioners.

Be it further resolved, that this resolution shall be effective and become a part of the original contracts after the Coast Bridge Company shall have signed their acceptance and waiver of the change of the terms of the original contract as herein specified and referred to.

Be it further resolved that the County Clerk be authorized to draw two warrants on the special Road and Bridge Fund in favor of the Coast Bridge Company, each of said warrants to be in the sum of \$12,500, and said sum to be charged in the respective amounts to the Troy Bridge and the Rexford Bridge.

(Testimony of Louis J. Klenck.)

Q. Now, Mr. Klenck, have you any reference there in your papers and documents that you have with you, to the time when a payment was made upon the bridge. I call your attention to page 342 of the minutes of the Board of County Commissioners.

By Mr. LOGAN.—I will tell you, Judge Rasch, we will admit that these payments were all made out of the order provided in the contract, if you care to save that time.

By Judge RASCH.—Then it may be admitted, I imagine, that on the 26th day of November, 1912, an additional ten thousand dollars was authorized to be paid, and was paid to the bridge company.

By Mr. LOGAN.—Yes, we will admit that. Of course, the admission is subject to our objection to the whole testimony relating to payments. As I understood the Court, we can state the grounds of our objection at a later time. One of the grounds is that you have not set up the affirmative defense that entitles this to be admitted.

By the COURT.—You must state your objection, if you have any.

By Mr. LOGAN.—The plaintiff objects to this testimony in addition to the grounds already stated, that there has been no plea, no affirmative plea, setting up an alteration in the contract which would discharge the surety; that it was beyond the power of the County Commissioners to discharge the surety from an obligation required by statute for the construction of a bridge; and upon the further ground that it is an immaterial departure from the contract

(Testimony of Louis J. Klenck.)

under the rules laid down by the Supreme Court of the State of Montana, and the Statutes of Montana.

By the COURT.—The objection will be overruled at this time. If the evidence is not competent, the Court will attach no weight to it.

Q. I call your attention, Mr. Klenck, to page 380 of the minutes of the proceedings of the Board of County Commissioners. What do you find there?

A. There was a special meeting held on December 28, 1912.

By Judge RASCH.—Now I offer in evidence, if the Court please, the minutes of the special meeting of the Board held on the 28th day of December, 1912.

Whereupon said minutes, marked exhibit 8, defendant, were received in evidence and are as follows:

Defendant's Exhibit No. 8—Minutes of Proceedings of Board of County Commissioners of Lincoln County, December 28, 1912.

“Libby, Montana, December 28, 1912.

Board met in Special Meeting in the Court House at Libby, Lincoln County, Montana, at 1 o'clock A. M. pursuant to the following call:

Libby, Mont., December 28, 1912.

A special meeting of the Board of County Commissioners of Lincoln County, Montana, is hereby ordered to be held December 28, 1912, at 10 o'clock A. M. in the Court House at Libby, Montana, held for the purpose of accepting bridge constructed across Kootenai River at Troy and Rexford, and

bridge constructed across Tobacco River on the Emile Pejeau farm by the Coast Bridge Co., and paying for same; the granting of two liquor licenses; the letting of printing contract for the County, the cancellation of the Chas. Z. Pond warrants allowing two Refunds and such emergency matters that might come before the Board.

PAUL D. PRATT,
Chairman.

J. P. BARTLETT,
Commissioner.

F. P. GAREY,
Commissioner.

Present: Paul D. Pratt, Chairman; J. P. Bartlett and F. P. Garey, Commissioners, and Samuel Carpenter, Clerk.

J. M. Duthie, County Surveyor, made report as to the extras on the Troy and Rexford Bridges, Construction, consisting of as follows:

Rexford Bridge, 684 ft. of approach and 1716 ft. of piling

.

Bills allowed Coast Bridge Company, in final acceptance of bridges are as follows:

.

Coast Bridge Co. Balance on Rexford Bridge \$6845.40."

The witness further testified:

The warrant for \$12,500 was written within a day or two after the claim was allowed, but whether it was paid by the treasurer to the Coast Bridge Company, the same day or not, I cannot say.

Testimony of Mr. Donaldson, for Plaintiff.

Mr. DONALDSON, a witness, called and sworn on behalf of the plaintiff, testified as follows:

That the lengths of the piling delivered by him to the Rexford Bridge were 22 feet; that all the piling were of the same length.

Testimony of James Mechan, for Plaintiff.

JAMES MECHAN, a witness called and sworn on behalf of the plaintiff, testified that he was present during the driving of the last piling and he knew that about sixty were driven in the coffer dam.

Testimony of Martella Brandenburg, for Plaintiff.

MARTELLA BRANDENBURG, a witness called and sworn on behalf of the plaintiff, testified that he knew of the length of the piling delivered at the Rexford bridge and he knew they were all of the uniform length of 22 feet.

Testimony of H. O. McCall, for Plaintiff.

H. O. McCALL, a witness called and sworn on behalf of the plaintiff, testified that "I am a diver; that I examined the piling after the bridge had washed out; that all except sixteen of these piles were cut off at the bottom flush with the concrete; that sixteen were protruding from out the concrete a distance of 3 feet 8 inches and that they varied 6 inches from 3 feet 8 inches.

Testimony of Paul D. Pratt, for Plaintiff.

PAUL D. PRATT, a witness called and sworn on behalf of the plaintiff, testified as follows:

I am and have been since 1909 the chairman of the

(Testimony of Paul D. Pratt.)

Board of County Commissioners of Lincoln County. I was one of the commissioners at the time the contract was made with the Coast Bridge Company for the construction of the Rexford Bridge. The Rexford Bridge was never completed in that the painting of the bridge required by the contract was **never** done. I know why the payments were made to the Coast Bridge Company as they were made. Injunction proceedings were brought against the Board to prevent the issuance of the bonds which were afterwards issued and sold to secure the money with which to build these bridges. After the bonds were sold there was some further talk of an attempt being made to stop the construction of the bridges, and our advice and judgment caused us to anticipate the payments as called for in the contract. The Board of County Commissioners did not have any engineer, or other person supervising the construction of the bridge in question. I was not present during the time that the piling was being driven for the center pier in the Rexford bridge, and I do not think that either of the other commissioners was present.

Cross-examination.

The payments were made in a way other than specified by the contract by reason of the difficulty that the Board had in getting the work started.

Q. And with reference to the contract, by whom was the contract prepared?

A. I think that the contract was drafted largely by the Coast Bridge Company, and submitted to the county attorney to pass upon it, who possibly re-

(Testimony of Paul D. Pratt.)

drafted it and rewrote it.

Q. Isn't it a fact that the contract for the construction of the bridge was drawn by the then county attorney of your county?

A. I think you are right about that. Of course, the contract for the building of the bridge was drawn after the plans and specifications had been submitted.

A. Yes, sir.

Q. And with reference to the bond given by the defendant surety company, that bond was likewise prepared by the then county attorney of the county, was it not?

A. No, I don't think that it was; I am not sure about that; in fact I don't believe it was.

On redirect the witness testified as follows:

Q. That bond was executed in Portland, was it not? A. That was my recollection of it.

Testimony of Mr. Kennedy, for Plaintiff.

Mr. KENNEDY, a witness called and sworn on behalf of the plaintiff, testified as follows:

I reside in Spokane, Washington. Am a civil engineer. Have had nine years experience at structural work. I examined the wreck of the bridge at Rexford, Lincoln County, in December, 1913. The direct cause of the collapse of the bridge was that there was a wash there, which undermined the pier, the piling themselves under the pier were not driven sufficiently, after there was a slight underwashing to support the weight of the pier. The pier then, when the wash had proceeded to probably the center or slightly beyond the center of the pier, started to dip

(Testimony of Mr. Kennedy.)

up stream and as far as I could learn, it hung in that position for some time, just generally as the wash proceeded, keeping the piles pushing down into the gravel, then, when it got to a certain angle, it was standing in a position probably dipping north and east, it slanted down until it sheared off the piles as Mr. McCall reported to me, they were sheared off the up stream end, and pulled the piles off on the down stream end, and then the bridge just toppled over sideways. If the piling had been driven to the coffer dam to a point where under the blow of a two thousand pound hammer, falling twenty feet, the penetration would not have exceeded a half inch, the pier would not have toppled over.

There was also evidence introduced on behalf of the plaintiff that the piles were not driven to a point where under the blow of a two thousand pound hammer the penetration would not exceed a half inch, and that the piles were not ringed, nor shod, and were broomed very little, if at all.

Testimony of Paul D. Pratt, for Plaintiff.

PAUL D. PRATT was afterwards recalled as witness for plaintiff, and testified as follows:

The Coast Bridge Company had represented to us that they were competent bridge engineers, competent construction engineers, and that if pilings were necessary, they would so advise us, and if it were necessary to drive pilings they would drive them. We relied on their judgment and allowed them to proceed with the construction of the pier in the man-

(Testimony of Paul D. Pratt.)

ner which we thought was dictated by their best judgment.

On cross-examination witness testified :

Q. Well, now, the law imposes the duty upon the county engineer to supervise the work as it progressed on those bridges, did it not?

By Mr. LOGAN.—We object to that as calling for a conclusion.

Q. The county had a county engineer, did it not?

A. The county had a county engineer. His name was John M. Duthie.

Q. Did he give any attention to the work as it was going on?

A. Not so much to work during construction, as he did in the preliminary stages to the location of the bridge and the data in making designs.

I don't know whether the Bridge Company had any engineer on the work. Mr. McClain was superintendent of the work. He is the only man as far as I know who had charge of the work or any supervision over it. I did not make any inquiries as to whether any of the engineers of the construction company would be in charge of the work, or be in charge of the work as it progressed. Mr. Sears and Mr. Whitlock visited the work at more or less intervals. I think they were at Rexford Bridge on one occasion when the center pier was begun, about the time the excavation was completed. The Board of County Commissioners did not at any time authorize, empower or direct any individual member of the Board to supervise this bridge or see that the bridge

(Testimony of Paul D. Pratt.)

was properly constructed. There was never any agreement that any particular member of the Board should supervise this construction. The Board never made any order directing the county surveyor to supervise the construction of any of these bridges. The individual members of the Board never directed the county surveyor to supervise the construction of any of the bridges.

Thereupon, the bills or claims of the Bridge Company were offered and received in evidence as Plaintiff's Exhibit 10, and are as follows:

Plaintiff's Exhibit No. 10—Bills of Coast Bridge Co.

“July 26, 1912.

LINCOLN COUNTY

To Coast Bridge Co., Dr.

Advance payment on bridge at Rexford

ford as per Resolution passed by

Board of County Commissioners July

26, 1912.....\$12,500.00

State of Montana,

County of Lincoln,—ss.

I, G. A. Sears, Secretary Coast Bridge Co., solemnly swear that the above account is true and just, that the items specified therein were furnished in good faith, and that the above amount remains due and wholly unpaid, so help me God.

COAST BRIDGE CO.

By GEO. A. SEARS,

V. Pres.

Subscribed and sworn to before me this 26th day
of July, 1912.

[Seal]

SAMUEL CARPENTER,

By Louis G. Klenck,

Dep.

October 21, 1912.

LINCOLN COUNTY

To Coast Bridge Co., Dr.

To part payment on bridge over Kootenai
River at Rexford, Montana, under
contract 2,500.00

State of Montana,
County of Lincoln,—ss.

I, Geo. A. Sears, Vice-pres., solemnly swear that
the above account is true and just, that the items
specified *therein furnished* in good faith, and that the
above amount remains due and wholly unpaid, so
help me God.

GEO. A. SEARS,
Vice-pres.

Subscribed and sworn to before me this 21st day
of Oct., 1912.

(County Seal)

SAMUEL CARPENTER,

County Clerk.

LINCOLN COUNTY

To Coast Bridge Co., Dr.

Account Steel delivered for Rexford
Bridge\$10,000.00

State of Montana,
County of Lincoln,—ss.

I, Geo. A. Sears, Vice-Pres., solemnly swear that the account is true and just, that the items specified therein were furnished in good faith, and that the above amount remains due and wholly unpaid, so help me God.

GEO. A. SEARS,
V. Pres.

Subscribed and sworn to before me this 26th day of Nov., 1912.

(County Seal) SAMUEL CARPENTER,
County Clerk.

By Louis G. Klenck,
Deputy.

Dec. 16, 1912.

LINCOLN COUNTY

To Coast Bridge Co., Dr.

As per Vouchers attached.....6845.40

Voucher.

December 16, 1912.

For Bridge across Kootenai
River at Rexford, Montana,
as per Contract dated Dec.

18th\$24,252.00

1911, Revision dated Feb. 5,

1912 3,487.00

Received on account... 25,000.00

Balance due on comple-
tion 2,739.00

\$27,739.00 \$27,739.00

Voucher.

(Testimony of Paul D. Pratt.)

December 24, 1912.

Bridge over Kootenai River, Rexford,
 Montana, Piles in foundation 1716 lineal
 feet at \$0.40.....\$ 686.40
 Voucher.

Bridge over Kootenai River, Rexford,
 Montana. Approach to Rexford Bridge
 684 lineal feet\$3,420.00

State of Montana,
 County of Lincoln,—ss.

I, John P. Whitlock, President Coast Bridge Co.,
 solemnly swear that the above account is true and
 just, that the items specified therein were furnished
 in good faith, and that the above amount remains due
 and wholly unpaid, so help me God.

COAST BRIDGE CO.

By J. P. WHITLOCK.

Subscribed and sworn to before me this 28th day
 of Dec., 1912.

PAUL D. PRATT,
 County Commissioner."

Said witness further testified that at the time of
 the completion of the excavation of the Rexford
 bridge I was present, and I found there was a sand
 and gravel formation at the bed of the river. I can-
 not be positive that the depth had been made in con-
 formity with the plans or, whether they had gotten
 down farther. I think that we had some talk about
 the depth of the excavation that was being made at
 that time. I think that the county attorney drew
 the contract.

Testimony of C. W. Raynor, for Defendant.

C. W. RAYNOR, a witness called and sworn in behalf of the defendant National Surety Company, testified as follows:

I am a resident of Portland. Was chief engineer of the Coast Bridge Company at and prior to the time of the construction of the bridge at Rexford. The first payment of \$12,500 on the bridge was made in the latter part of July, 1912. At the time of this payment the construction of the bridge had not been commenced.

Q. When the payment was made in September, to what extent had the construction of the bridge progressed?

A. I don't think there had been hardly anything done in the field.

By Mr. LOGAN.—Just a minute, was he up there?

By Mr. GUNN.—No, he was in the office, and getting reports.

A. Everything regarding the job went through my hands, that is, all letters, expense of material of *materials*, and reports.

Q. Do you know whether or not the center pier had been constructed at that time?

A. No, sir, I was on the job, I think it was the first part of October, and at that time the east approach had only been partly built.

When I drew the plans I left the matter of how deep the excavation should go open so it could be determined when the excavation had been made; that the plan was simply gotten up in this regard for the

(Testimony of C. W. Raynor.)

purpose of making a basis for a bid and that the county should determine when the excavation was made, what kind and how many pilings were desired and the County would determine whether they desired any piling to be used at all or not; that the recital in the specifications to the effect that "after excavation is made to the full depth piles should be driven inside, if so ordered by the engineer" referred to the County representative engineer, and in accordance with these specifications the Bridge Company kept no engineer on the job; that if the question of using piling at all under this center pier had been left to me, I would have used none and instead would have carried the concrete on down lower. In my judgment the driving of the piling was not practical; that the information I obtained for drawing these plans, I obtained from the County Engineer of Lincoln County and based it upon the profile prepared by him.

Testimony of M. L. Gerry, for Defendant.

M. L. GERRY, a witness called and sworn on behalf of the defendant, testified as follows:

I am a civil engineer; have had to do with a great many foundations for bridges and piling. I reside at Helena, Montana, and have been engaged in that business for 25 years; that a square pile 8 x 8" in diameter, 22' long, imbedded 4' in the ground would sustain a weight of around 30,000 pounds, and a 2,000 lb. hammer, falling 20 feet would strike 40,000 lbs. to the foot or a total of 800,000 lbs., and that the piling

(Testimony of M. L. Gerry.)

would not stand that sort of a blow; and if a blow of this kind was inflicted upon piling of this kind when at the point of refusal there would be nothing left of the piling; that the blow would be about 400 per cent more than the ultimate strength of the pile.

Testimony of R. A. McClayn, for Defendant.

R. A. McCLAYN, a witness called and sworn in behalf of the defendant, testified as follows:

I reside at Portland now and have been for the past six years employed by the Coast Bridge Company as superintendent of the construction of bridges. Had charge of the construction of the three bridges in Lincoln County, one at Libby, one at Troy and one at Rexford, constructed by the Coast Bridge Company. Started work on the Rexford bridge on September 21, 1912. That is the date the first work was done on the ground. Commenced the construction of the center pier of the bridge October 10, 1912. The center pier was not constructed at the point designated by the plans. Mr. Geary wanted the location of the bridge moved sixteen feet closer to the Rexford side than was done and the center pier was placed sixteen feet nearer the Rexford side of the river than shown on the plans. No change was made in the plans. Mr. Geary was one of the County Commissioners.

Piles used throughout were 8 x 8" and 22' long.

Witness further testified:

Q. Mr. McClayn, let me ask you whether at the time when Mr. Gerry directed you to change the position of the center pier, from the point where it was

(Testimony of R. A. McClayn.)

located on the plans, to a point sixteen feet nearer to Rexford, whether you made any objection, or whether you had any discussion with him as to the advisability of making that change.

A. I did, for the reason—

Q. What did you tell him?

A. Well, we had our false work already driven, also our approach ready. It gave us a short opening. It would throw the pier that was not quite in the center of the river further out in the center of the river, and the river swirling around this way, would have a bigger sweep at the pier than it would have if it had been left ten feet further away to the Rexford shore.

Q. Now, after you had made the excavation to the depth of eight feet and six inches, as you stated, what did you proceed to do further?

A. I notified the commissioners, and I think it was Mr. Pratt probably that measured the hole, no, it was Duthey.

Q. Mr. Duthey measured the excavation?

A. Yes, sir.

Q. And after he had measured it, what did you do then? A. We drove the pile.

Q. By the way, Mr. McClayn, how many piles did you actually use in the coffer dam?

A. Sixty-two.

Q. After the piling had been driven, did any of the county commissioners come there to inspect the work? A. Yes, sir.

Q. Who? A. Mr. Geary.

3 1111

(Testimony of R. A. McClayn.)

Q. Mr. McClayn, had you received any instructions, or directions from Mr. Geary as to the putting in of any concrete after the piles had been driven, and as to the time when the concrete should be put in?

Q. Had you received any directions from Mr. Geary as to when you should put in the concrete after the piles had been driven? A. Yes, sir.

Q. What were they?

A. He requested us not to put in any concrete until we had notified him.

Q. Well, did you notify him? A. We did.

Q. And then it was, as you just testified a moment ago, that after he had been notified, he came there, and inspected the piles after they had been driven, is that right? A. Yes, he did.

The witness further testified.

Q. Your understanding, then, is that Mr. Geary simply suggested this himself, and you moved it wholly at his suggestion?

A. The company also notified me to do as Mr. Geary wished, to move the bridge.

Q. In other words, whatever he did, they had constituted him the agent of the company for the doing or making any changes that he wanted to make?

A. Certainly not, our specifications, our specifications were to go in as the man in charge of the work dictated us to do.

Q. And they informed you that you were to follow the instructions of Mr. Geary?

A. Exactly.

(Testimony of R. A. McClayn.)

Q. How far were you to follow his instructions, in all matters, or to some matter?

A. With that one matter.

Q. Just the one alone, he had no authority over you, except as to where the pier should be placed?

A. He did at all times, the Commissioners, and the County Surveyor.

Q. What I am trying to get at, how far did that authority extend over you?

A. Absolutely, whatever they requested me to do, I was to do.

Q. In other words, you were the superintendent of the company, and they were your superintendents?

A. Yes, sir.

Q. You were to follow their directions in all things? A. Exactly.

Witness further testified:

There was another change made in the construction of the bridge. The floor of the bridge was lowered three feet below the elevation shown on the plans to coincide with the shore on the Rexford side. In other words, the floor of the bridge, as constructed, was approximately three feet lower than shown on the plans. The change was made after a meeting on the ground at which Mr. Duthie, county surveyor, Mr. Pratt and Mr. Geary, county commissioners, and Mr. Whitlock, president of the Coast Bridge Company, were present, and talked the matter over. I received a letter from the Coast Bridge Company directing me to make the alteration. The change in the height of the bridge from the height

(Testimony of R. A. McClayn.)

shown on the plans, was not noted on the plans, nor were any plans prepared showing the changed height of the bridge.

Cross-examination.

Mr. Geary was the instigator of the change of the location of the center pier. The change was made at his request. The Bridge Company notified me to do as Mr. Geary wished, to move the bridge. I was directed to follow the instructions of Mr. Geary with reference to the matter.

Said witness further testified:

Q. That is, from the position that you held, you were not expected to know any of the reasons, or whys or wherefores? A. Exactly.

Q. You were to follow his instructions, Mr. Geary's instructions?

A. Yes, sir. Mr. Geary knew the length of the piles.

Redirect Examination.

When Mr. Geary requested the change in the location of the center pier I immediately communicated with the Bridge Company in Portland by telegram. (Witness produced telegram, which was offered and received in evidence and is as follows):

Telegram, October 17, 1912, McClane to Coast Bridge Co.

“Libby, Mont., Oct. 17-12.

Coast Bridge Co.,

Portland, Ore.

Gerry contends that extension over banks should practically all be on Rexford side and wants location

(Testimony of R. A. McClayn.)

of piers moved sixteen feet as they now stand Rexford pier is fifty two feet from water opposite pier twenty two feet and located where engineer told me to put them Will see Pratt and go up with delay ten days to move location fourteen bents falsework drove coffer dam sunk ready to dridge wire.

B. A. McCLANE.

840 AM. 18th."

Witness further testified that he received a telegram in reply from the Coast Bridge Company, and produced same. The telegram was offered and received in evidence and is as follows:

Telegram, October 18, 1912, Coast Bridge Co. to McClain.

"October 18, 1912.

To B. A. McClain,

Libby, Montana.

Consider change of location more expensive than beneficial. If board insist, get written instructions to proceed under force account.

Coast Bridge Company.

Charge account Coast Bridge Co."

Witness further testified:

The center pier was completed during the week ending the 14th day of December, 1912.

Mr. McCLAYN, recalled as a witness, testified as follows:

The bridge was actually completed December 31, 1912.

Testimony of Elmer Thompson, for Plaintiff.

ELMER THOMPSON, a witness called and sworn on behalf of the plaintiff, testified as follows on redirect examination:

Q. Mr. Thompson, do you recall whether or not Mr. Gerry was there at any time while those piles were being driven, or after they had been driven?

A. After they had been driven, yes, sir.

Q. And before or after the concrete was being put in?

A. Why, it was before the concrete was put in.

Q. Before the concrete was put in?

A. Yes, sir.

Q. Did he go out and look at the Coffey Dam and the piles, as they were standing there?

A. Yes, sir.

Testimony of Frank B. Geary, for Plaintiff.

FRANK B. GEARY, a witness called and sworn, testified in behalf of plaintiff in rebuttal, as follows:

Q. Mr. Geary, you heard the evidence here relative to the moving of this center pier, a distance toward the Rexford shore of the river, did you not?

A. I did.

Q. The statement of the witness was also to the effect that it was at your suggestion. Have you any knowledge, that is, do you know definitely as to why that pier was moved, and at whose suggestion it was moved? A. It was moved at my suggestion.

Q. You may relate the facts concerning it.

A. That was done in conformity with Mr. Whit-

(Testimony of Frank B. Geary.)

lock's suggestions. After the original contract was entered into, Mr. Whitlock came to the ground, the scene of the Rexford Bridge, and suggested that the bridge was not long enough, as per the original contract,—insisted that it should be forty feet longer, and the pier on the west shore set right at the edge of the bank, and the pier on the east shore next to Rexford should extend as far back on the bank as it would, with 440 feet of bridge, thereby eliminating the possibility of the Rexford shore pier washing out, or in other words, the water going around it. It seems that that had not been arranged, and when I got down there at a certain time, they were preparing to set the pier on the west shore, back clear up on the bank, and I saw this, and said, "It is not right, it is not in accord with Mr. Whitlock's suggestion, and insisted that they must change it so as to put the pier on the west shore right at the edge of the bank as Mr. Whitlock had suggested, and thereby letting the pier on the east shore extend back as far as it would,—the east shore was gravel.

Witness further testified:

Mr. Whitlock is president of the Bridge Company. According to his theory the change was made for the purpose of insuring stability to the bridge. The change was a departure from the original contract as made in December. I don't think the details of the location as changed were incorporated in the modified contract subsequently made, but the additional forty feet was provided for in the supplemental contract. The purpose, as Mr. Whitlock con-

(Testimony of Frank B. Geary.)

tended, of making the bridge longer than specified in the original contract was to place the pier on the east shore back from the water's edge and thereby avoiding the possibility of the water from cutting out the gravel from around the pier. In other words, it was to protect the pier on the east shore. I don't know anything about the floor of the bridge having been lowered. I was not consulted and was not a party to it. First learned that the floor had been lowered during this trial. Mr. Duthie was county surveyor at the time the bridge at Rexford was constructed. The Board of County Commissioners never authorized Mr. Duthie to supervise the construction of the bridge.

Testimony of W. A. Armstrong, for Plaintiff.

W. A. ARMSTRONG, witness called and sworn on behalf of plaintiff, testified as follows:

I am the State Manager of the National Surety Company, defendant corporation. I have a letter here dated March 7th from Logan and Child (here defendant admits that the letter following was written by Logan and Child, counsel for plaintiff.) (Whereupon the following letter was admitted and marked Exhibit 13-D.)

**Plaintiff's Exhibit No. 13-D—Letter, February 6,
1914, Logan & Child to National Security Co.**

“February 6, 1914.

National Security Co.,
Care of Secretary of State,
Helena, Montana.

Gentlemen:

At the request of the Board of County Commissioners and the County Attorney of Lincoln County, Montana, we are writing you concerning the bond furnished by you for the Coast Bridge Company bridge at Rexford, in the County above named.

In the spring of 1913, the middle pier of this bridge was destroyed and in consequence thereof the bridge collapsed. Recently the County Commissioners met with the officers of the Coast Bridge Co. at Spokane and endeavored to agree on some sort of an adjustment of the claim of Lincoln County, but were unsuccessful, and it now becomes necessary for us to take this matter up with you with a view to securing, if possible, a friendly adjustment of the matter and failing in that, to assure you that we will be compelled to commence action on the bond furnished by you. We wish to invite your attention to those provisions of the bond by which you guarantee that the work shall be done strictly according to the plans and specifications. It is our contention that the company failed to drive the piling in the pier to refusal and that they were required to do this under the following clause in the specifications, viz.:

‘Pile to be driven with a hammer weighing not less than 2000 lbs. The penetration under the last blow of the hammer falling twenty feet shall not exceed one half inch.’

We have had the wreck examined by a competent engineer who called a diver to his assistance, and we think we can clearly demonstrate that the cause of the collapse was the failure to drive the piling in accordance with the specifications mentioned. We wish also to call your attention to the fact that the steel from this bridge is now lying in the bottom of the Kootenai river. We have no means of knowing whether this steel, or any part of it, may be salvaged at a cost which would justify the undertaking. The Coast Bridge Co. has declined to salvage the material or to indemnify the County if the latter should undertake the work. During high water it would probably be impossible to recover the material and it may be possible that high water and ice will totally destroy it. Therefore, we feel it our duty to advise you of this condition so that if you so desire to salvage the material you may have an opportunity to do so during the winter months when the water is low.

We would be glad to take this matter up with you in the same friendly way that we have heretofore taken it up with the Coast Bridge Co. and if you take the position that there is no liability on the bond, we would be glad to be so advised at an early date and to the end that we may commence proceedings to

test the question of liability.

Very truly yours,

LOGAN & CHILD."

Witness Armstrong continued:

Mr. McGee is the General Assistant Solicitor of the National Surety Company. It is his signature which is attached to Exhibit 14-D. (Whereupon Exhibit 14-D was offered and admitted.)

**Plaintiff's Exhibit No. 14-D—Letter, March 14, 1914,
Magee to Logan & Child.**

"NATIONAL SURETY COMPANY.

New York, March 14, 1914.

Re Bond #634973—File No. 8976—Coast Bridge
Company.

Logan & Child, Esqrs.,
Conrad Bank Building,
Kalispell, Montana.

Dear Sirs:

Your letter of the 6th ult. addressed to the National Security Company, c/o Secretary of State, Helena, Mont., has been referred here for our attention. Inasmuch as this Company was surety on the bond of the Coast Bridge Company for the erection of a bridge at Rexford, Mont., we have no doubt the letter was designed for us.

This Company was merely surety on the bond in question, and, of course, must be governed by the instructions and directions of its indemnitors in all matters arising under it. We are definitely advised that the work was performed in strict accordance with the contract and specifications, that it was done

(Testimony of W. A. Armstrong.)

under the supervision of the County and its representatives, and that it was finally accepted as a fully completed contract by the County.

Under these circumstances, we must reserve all our rights and defenses and deny liability.

Very truly yours,

JOSEPH MAGEE,

Assistant General Solicitor."

Whereupon defendant admitted that the National Surety Company, defendant herein, is a surety company for compensation.

Q. In this letter they refer to their indemnitor. Now in your business has that word "indemnitor" any particular meaning. That is, any special meaning?

By Mr. GUNN.—We object to that as incompetent, irrelevant and immaterial.

By the COURT.—What is the purpose of this?

Whereupon plaintiff offered to prove by the witness Armstrong, that the National Surety Company was not the real defendant in this action. That the surety company had turned over the management of this case to the Coast Bridge Company and that the Coast Bridge Company had guaranteed the National Surety Company; had provided attorneys and that the National Surety Company was only a nominal defendant; and that the entire control and management of the case had been taken over by the Coast Bridge Company, under the arrangement by which the Coast Bridge Company was to pay the entire expense, and that the Surety Company had been in-

demnified by the Coast Bridge Company. The purpose is to show that the surety company is an indemnified surety.

Whereupon the defendant's objection was sustained by the Court.

The foregoing is all of the testimony relating to payments made by Lincoln County to the Coast Bridge Company for the construction of the bridge at Rexford, relating to the changes in the bridge from the plan of the bridge referred to in and made a part of the contract for the construction of the bridge, relating to the supervision of the construction of the bridge by or in behalf of the county, and relating to any change or modification of the contract by the resolution of the Board of County Commissioners adopted at the meeting of said board held the 26th day of July, 1912, and the acceptance thereof by the said Bridge Company. No testimony was offered or introduced showing that the War Department of the United States ever approved the plans and specifications for said bridge, or granted permission for the construction of same, and no evidence was offered or introduced by either of the parties touching the question of the navigability or non-navigability of the Kootenai River at the point where the Rexford Bridge was constructed or elsewhere, and no testimony was introduced or offered showing that the National Surety Company ever had any notice or *or* acquiesced in a change or modification of the contract by the resolution adopted by the Board of County Commissioners July 26, 1912, and

the acceptance thereof by the Bridge Company.

At the conclusion of the testimony the National Surety Company moved for judgment in its favor upon the grounds and for the reasons, among others, that the complaint does not state a cause of action; that the change and modification in the contract as made by the resolution of July 26, 1912, and the acceptance thereof by the Bridge Company, relieved and released the Surety Company from any liability; that by making the payments of the contract price before such payments were due, according to the contract, the Surety Company was released and relieved from liability; that by departing from the plan for the construction of the bridge, adopted by the contract, in changing the location of the center pier and lowering the floor of the bridge, the Surety Company was released from all liability; that by failing to allege or prove that the plans and specifications had been approved by the War Department of the United States; or that permission for the construction of said bridge had been obtained from said department, the plaintiff had not established any liability against the Surety Company; that the Surety Company was released from liability by the failure of the county to appoint an engineer or inspector to supervise and superintend the work of the construction of said bridge and by failing to take any precaution to insure the performance of the contract; that the bond has reference to a contract for the construction of a "two-span riveted bridge * * * , together with three concrete piers,"

whereas the bridge which was built was a two-span pin-connected bridge with one concrete and two tubular piers, by reason of which the Surety Company is not liable.

Thereupon the Court took said motion under advisement and thereafter on the —— day of April, 1916, overruled said motion, to which defendant accepted. Upon denying said motion the Court found in favor of the plaintiff and rendered judgment accordingly.

And thereafter and on the —— day of April, 1916, judgment was rendered in favor of said plaintiff and against said defendant National Surety Company for the sum of \$29,345.40, together with plaintiff's costs and disbursements taxed at the sum of \$——.

That the decision and opinion of said Court in said cause was in writing, and, omitting title of court and cause, is as follows:

Opinion.

Action by a building of a bridge against the contractor's surety. Defendants objection to any evidence "for the purpose of the record * * * simply a formal matter," no defect in the complaint being pointed out, was overruled as of a class disfavored in that it tends to defeat justice rather than to promote it, the court stating if the complaint was defective, amendment would be allowed. If necessary, amendment is deemed made to conform to proof.

The complaint is that the contractor, the Coast Bridge Company, failed to perform its contract in that it did not drive the center pier piles as required

by specifications and because of which the pier undermined and with the bridge fell. The answer is of denials only. The structure was a highway bridge of 18 feet floor width and two 220 feet spans supported by a center pier. It was at Rexford, Montana, and over the Kootenai River, a swift mountain stream over 400 feet wide, the water stage varying in depth from 12 to 30 feet.

The contractor agreed to provide "all material, labor and other things of every description" to build the bridge "in good workmanlike and substantial manner * * * so as to make it a perfect bridge according to the plans and specifications" furnished by it. These plans were indefinite in the matter of the depth of the center pier, extent of concrete and whether or not piles would be used therein, the contractor leaving "that open to be determined after" excavation. The specifications provided that all piers would "be sunk to the elevation called for on the plans" and "piles shall be driven inside if so ordered by the Engineer"; that piles would be round, not less than 12 inches at the larger end and 9 at the smaller, and of the "length called for on the plans," though the contract of which the specifications were a part stated the length "shall be specified and determined by the county or its representative"; and that the piles would be shod and ringed if necessary and driven with a hammer of not less than 2000 pounds and under the last blow falling 20 feet, the penetration not to exceed one half inch.

References to "the engineer" are ambiguous save in one instance to "the local engineer." If con-

strued to import the builder's engineer (though these were the contractor's specifications) there was no stipulation obligating the builder to secure an engineer. It was optional and the builder secured none. For the center pier the contractor excavated about 8½ feet deep in sand and gravel. Its superintendent testified the bottom was then tested with an inch pipe and a maul and by four piles eight inches square which were driven until destroyed, "probably four feet" deep. He ordered like piles 22 feet long and 62 of them were driven, it would seem to depths varying from 3 feet 5 inches to 3 feet 11 inches.

When the driving commenced the water was about 18 feet deep and gradually rose, each pile being driven until its top was practically at water level. They were not ringed nor shod, and broomed little if any. Around and upon them the concrete center pier was constructed. About six months later the water undermined the pier so that it overturned and the bridge fell. A diver found that about 16 piles at the downstream end of the pier were intact, the others having been sheared off. Without further detailing the evidence and conflicts in facts and opinions, the finding is that the piles were not driven in accordance with the contract and to refusal, and that because thereof the pier and bridge fell.

It is probable as urged by defendant that these smaller piers would not endure driving strictly as specified. But for all that appears the builder did not order them and their use was the contractor's choice. Even if maintainable that the builder had

knowledge and acquiesced, in that one of its board of commissioners at least saw the piles after they were driven, it had no knowledge that they were not driven as nearly as possible in accordance with specifications and to refusal. And this view of the piles was from the false work, nothing appearing that it sufficed to and did disclose smaller piles had been driven. Furthermore, the board member was in substance told by the contractor's superintendent that the piles had been driven seven feet and to refusal, and so satisfied. Since the undermining re-filled and its extent is not definitely known, it is urged that it may have been so great that in any event the result would have been the same.

The failure to drive the piles to refusal is a sufficient and reasonable cause for the destruction of the bridge. It is clear the undermining was so great that these piles could not resist it. That it might also have been so great that these piles driven to whatever unknown depth would have been refusal, could not have resisted it, is mere conjecture and not permissible.

Curiously enough, defendant introduced evidence and contends that the excavation for the pier should have been deeper and no piles used; that the damage is due to defective plans and poor engineering. To concede it would not seem to better defendant's case, for the contractor was responsible for both plans and engineering. And if necessary, the complaint would be deemed amended to conform to this contention and proof, involving no change in the cause of action but only in the particulars thereof.

The contract provided it would not take effect until Congress authorized the bridge and the War Department approved the plans and specifications. Congress authorized the bridge (See 37 Stat. 71) to be built in accordance with Act Mar. 23, 1906 (34 Stat. 84). This latter Act provided that a bridge over navigable waters, authorized by Congress, shall not be built until the plans and specifications have been approved by the Secretary of War and the Chief Engineers. Violation of the Act is a misdemeanor punishable by fines, and the bridge may be removed.

For the purposes of this case the contract and acts of the parties suffice to establish that Kootenai River is navigable. There is neither allegation nor direct evidence that the approval aforesaid was secured. Because thereof defendant urges that the contract did not take effect, that the bridge was builded unlawfully, and that the surety is not liable. The contract was lawful, and since it has been performed it must be presumed it was, as it could be, lawfully performed—that the contingency happened (the necessary approval) upon which it was to become effective. Then too, so far as this action is concerned, the obligation to secure such approval, if not more was as much the contractor's as the builder's. The former could not lawfully perform its contract prior to approval. A surety engages its principal, will lawfully perform. And if the latter unlawfully performs its contract, the surety is not discharged unless the builder knew of and acquiesced in such unlawful performance. And upon the surety is the burden to prove this.

It is admitted payments were made to the contractor "out of the order" of the contract, and were "anticipated"; but this does not serve to show that substantial departure from the contract which alone may discharge a surety in that it may injure him. If the payments were made out of the order stipulated, it may be the contingencies upon which payments were due happened out of the order anticipated and that the payments were properly made. Again, county warrants seem to have been referred to as payments, and it does not appear when the money was paid or the warrants even delivered.

The builder accepted the bridge. This waived all the contractor's defaults discoverable by reasonable inspection, like failure to paint the completed bridge (which however, does not appear to have been of the contract), but not those not so discoverable, like the defective piles. For the latter but not the former the surety is liable. There remains but the amount of damages. The contract price paid was \$29,345.40. The bond is in the sum of \$30,000. Of the bridge the shore piers and approaches alone remain. The county has not rebuilt. It may not. It would not seem bound to do so and to incorporate these remnants to mitigate damages. Under the circumstances such action well may be imprudent and impracticable. Its right is to refrain or to build of a new design and materials.

See *U. S. v. Fidelity Co.* 236 U. S. 526.

3 *Suth. Damages*, Sec. 699.

The loss is total. Any salvage is the contractor's. Plaintiff does not claim or suggest it is entitled to

interest, and the judgment will be for the contract price paid and costs.

And thereafter on the —— day of April, 1916, pursuant to stipulation of the parties the judge of said court made an order granting the defendant the National Surety Company thirty days from said date within which to prepare and serve this, its bill of exceptions.

And now comes the defendant National Surety Company and submits herewith this Amended Bill of Exceptions, to stand in place of the Bill of Exceptions heretofore settled in this action.

Dated this 5th day of July, 1916.

COY BENNETT,

GUNN, RASCH AND HALL,

Attorneys for National Surety Company.

Order Settling Amended Bill of Exceptions.

United States of America,
District of Montana.

I, George M. Bourquin, Judge of the District Court for the District of Montana, do hereby certify that the foregoing is a full, true and correct Bill of Exceptions in said action, and that the recitals therein regarding the testimony introduced are true and correct, and I do further order as well as certify that the Bill of Exceptions formerly, to wit, on the 6th day of May, 1916, settled in this action is by omission incomplete and this bill of exceptions is now by me hereby settled, allowed and approved as a true and correct bill of exceptions in said action to stand in place of the said former bill of exceptions.

Dated in open Court this 15th day of July, 1916.

BOURQUIN,

Judge.

**Certificate of Clerk to Supplemental Transcript of
Record.**

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 55 pages, numbered consecutively from 1 to 55 inclusive, is a full, true and correct copy of the original amended bill of exceptions in the above-entitled cause settled and allowed July 15, 1916, and hereby returned as a supplement to the original transcript on writ of error in said cause.

I further certify that the additional costs for such supplemental transcript amount to the sum of Twenty-five 20/100 Dollars (\$25 20/100), and have been paid by the plaintiff in error.

WITNESS my hand and the seal of said court at Helena, Montana, this 15th day of July, A. D. 1916.

[Seal]

GEO. W. SPROULE,

Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
7/15/1916. G. W. S.]

[Endorsed]: No. 2825. United States Circuit Court of Appeals for the Ninth Circuit. National Surety Company, a Corporation, Plaintiff in Error, vs. County of Lincoln, Defendant in Error. Supplemental Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed July 19, 1916.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

Thereafter, on May 29, 1916, Assignment of Errors was duly filed herein, in the words and figures following, to wit:

*In the District Court of the United States, for the
District of Montana.*

LINCOLN COUNTY,

Plaintiff,

vs.

NATIONAL SURETY COMPANY, a Corporation,
et al.,

Defendants.

Assignment of Errors.

Comes now the above-named defendant National Surety Company and presents and files, with its petition for a writ of error herein its assignment of errors as follows:

1. The District Court of the United States, for the District of Montana, erred in overruling and denying the objection to the introduction of any evidence on the part of the plaintiff in support of its complaint as amended, which objection was based upon the ground that said complaint as amended does not state facts sufficient to constitute a cause of action.

2. The said Court erred in overruling and denying the motion of the defendant National Surety Company made at the close of the testimony for judgment in its favor.

3. The said Court erred in holding and deciding that the complaint as amended states a cause of action.

4. The said Court erred in holding and deciding that the change and modification in the contract, as made by the resolution of July, 6, 1912, and the acceptance thereof by the defendant Bridge Company did not relieve and release the defendant the National Surety Company from the liability provided for in the bond furnished by said Surety Company.

5. The said Court erred in holding and deciding that the defendant National Surety Company was not released and relieved from liability by reason of the plaintiff having made payments of the contract price to the Bridge Company before said payments were due according to the contract between said plaintiff and said Bridge Company.

6. The said Court erred in holding and deciding that the defendant National Surety Company was not released and relieved from liability by reason

of the change in the location of the center pier and the lowering of the floor of the bridge, which constituted material departures from the plan for the construction of the bridge, adopted by the contract between said plaintiff and the Bridge Company.

7. The Court erred in holding and deciding that the plaintiff is entitled to recover, notwithstanding there is neither allegation nor proof that the plans and specifications for the bridge had been approved by the War Department of the United States, or that permission for the construction of said bridge had been obtained from said department.

8. The Court erred in holding and deciding that the plaintiff was entitled to recover, notwithstanding the failure of the plaintiff to appoint an engineer or inspector to supervise and superintend the work of construction of said bridge and by failing to take any precaution to insure the performance of the contract with said Bridge Company.

9. The Court erred in holding and deciding that the plaintiff is entitled to recover, notwithstanding the bond furnished by the defendant National Surety Company has reference to a contract for the construction of a "two-span riveted bridge...together with three concrete piers...while the bridge which was built was a two-span pin-connected bridge with one concrete and two tubular piers."

10. The said Court erred in rendering judgment for the plaintiff.

WHEREFORE, the said defendant and plaintiff

in error prays that the said judgment may be reversed.

CLARENCE H. GILBERT and
GUNN, RASCH & HALL,

Attorneys for Defendant National Surety Company.

Filed May 29, 1916. Geo. W. Sproule, Clerk.

Thereafter, on May 29, 1916, Petition for Writ of Error and Order allowing same were duly filed and entered herein, in the words and figures following, to wit:

*In the District Court of the United States, for the
District of Montana.*

LINCOLN COUNTY,

Plaintiff,

vs.

NATIONAL SURETY COMPANY, a Corporation,
et al.,

Defendants.

**Petition of the Defendant National Surety Company
for Writ of Error and Supersedeas.**

National Surety Company, a defendant in the above-entitled cause, feeling itself aggrieved by the proceedings had in said cause, and by the decision of the Court and the judgment entered in said cause on the 11th day of April, 1916, for the sum of \$29,345.40, and the further sum of \$849.00 costs, in favor of said plaintiff, and against said defendants, comes now by Clarence H. Gilbert and Gunn, Rasch & Hall, its attorneys, and petitions said court

for an order allowing said defendant to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the said defendant shall give and furnish upon said writ of error, and that upon the giving of said security, all proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And the said defendant herewith presents *it* assignment of errors in accordance with the rules of the said United States Circuit Court of Appeals and the course and practice of this Honorable Court.

And your petitioner, the defendant will ever pray, etc.

CLARENCE H. GILBERT and
GUNN, RASCH & HALL,

Attorneys for National Surety Company.

**Order Granting Writ of Error and Fixing Amount of
Supersedeas Bond.**

On motion of the attorneys for the defendant National Surety Company, the foregoing petition for writ of error is hereby granted and it is ordered that a writ of error to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment described in said petition, be and is hereby allowed, and that the amount of the bond on said writ of error be and is hereby fixed at the sum of \$2,500, and it is further ordered, in accordance

with the stipulation of the parties filed in said cause, that said writ of error shall operate as a supersedeas the same as though full security should be given as required by rule 13 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit.

GEO. M. BOURQUIN,

Judge.

Filed and entered May 29, 1916. Geo. W. Sproule,
Clerk.

Thereafter, on May 29, 1916, a Stipulation as to Bond was duly filed herein, in the words and figures following, to wit:

*In the District Court of the United States, for the
District of Montana.*

LINCOLN COUNTY,

Plaintiff,

vs.

NATIONAL SURETY COMPANY, a Corporation,
et al.,

Defendants.

**Stipulation that Writ of Error Operate as
Supersedeas, etc.**

WHEREAS, the defendant National Surety Company is about to petition for a writ of error to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment rendered and entered in the above action:

NOW, THEREFORE, it is stipulated and agreed that said writ of error, if issued, shall operate as a supersedeas, provided the said National Surety

Company shall give and furnish upon said writ of error a bond in the penal sum of \$2,500, conditioned to answer all damages and costs that may be awarded against it if it fails to make its plea good, and that an order may be made and entered in said cause in accordance with this stipulation.

Dated this 26th day of May, 1916.

SIDNEY M. LOGAN,
JAMES M. BLACKFORD,
W. H. POORMAN,

Attorneys for Plaintiff.

CLARENCE H. GILBERT and
GUNN, RASCH & HALL,

Attorneys for Defendant National Surety Company.

Filed May 29, 1916. Geo. W. Sproule, Clerk.

Thereafter, on May 29, 1916, Bond on writ of Error was duly filed herein, in the words and figures following, to wit:

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, National Surety Company, as principal, and the United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, duly authorized to do business as a surety company in the State of Montana, as surety, are held and firmly bound unto Lincoln County in the full and just sum of \$2,500, to be paid said county, its attorneys, successors or assigns, for which payment well and truly to be made we bind ourselves, our successors and

assigns jointly and severally firmly by these presents.

Sealed with our seals and dated this 29th day of May, 1916.

WHEREAS, lately, at a session of the District Court of the United States, in and for the District of Montana, in an action pending in said court between Lincoln County, as plaintiff, and National Surety Company, as defendant, a final judgment was rendered against said defendant and in favor of said plaintiff, and the said defendant National Surety Company, having obtained from said court a writ of error to reverse the judgment in said action, and a citation directed to said Lincoln County is about to be issued, citing and admonishing said county to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California;

NOW, THEREFORE, the condition of the above obligation is such that if the said National Surety Company shall prosecute its writ of error to effect, and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

Dated this 29th day of May, 1916.

NATIONAL SURETY COMPANY.

[Seal]

By W. K. ARMSTRONG,

Attorney in Fact.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY,

[Seal]

By CLINTON O. PRICE,

Attorney in Fact.

The foregoing bond is hereby approved this 29th day of May, 1916.

BOURQUIN,

United States District Judge.

Filed May 29, 1916. Geo. W. Sproule, Clerk.

Thereafter, on May 29, 1916, a Writ of Error was duly issued herein, which original Writ of Error is hereto annexed, being in the words and figures following, to wit:

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the Honorable, the Judge of the District Court of the United States, for the District of Montana, Greeting:

Because, in the record and proceedings as also in the rendition of the judgment of a plea which is in said District Court, and between National Surety Company, a corporation, plaintiff in error, and Lincoln County, defendant in error, a manifest error hath happened, to the great damage of the said National Surety Company, the plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together

with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 28th day of June, 1916, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable GEO. M. BOURQUIN,
Judge of the District Court of the United States,
District of Montana, the 29 day of May, in the year
one thousand nine hundred and sixteen.

[Seal] GEO. W. SPROULE,
Clerk of the District Court of the United States, in
and for the District of Montana.

The foregoing writ of error is hereby allowed.
May 29, 1916.

BOURQUIN,
District Judge.

Service of the within and foregoing writ of error and receipt of copy thereof is hereby acknowledged this 29th day of May, 1916.

SIDNEY M. LOGAN,
JAMES M. BLACKFORD,
W. H. POORMAN,
Attorneys for Defendant in Error.

Answer of Court to Writ of Error.

The Answer of the Honorable The District Judge
of the United States for the District of Mon-
tana, to the foregoing Writ.

The record and proceedings whereof mention is

made, with all things touching the same, I certify under the seal of said District Court of the United States for the District of Montana, to the Honorable The United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal]

GEO. W. SPROULE,
Clerk.

[Endorsed]: #395. In the District Court of the United States, for the District of Montana. Lincoln County, Plaintiff, vs. National Surety Company, a Corporation, et al., Defendants. Writ of Error and Order Allowing Writ. Filed May 29th, 1916. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy.

Thereafter, on May 29, 1916, a Citation was duly issued herein, said original Citation being hereto annexed and being in the words and figures following, to wit:

Citation on Writ of Error.

The President of the United States, to Lincoln County, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States, in and for the District of Montana, wherein National Surety Company is

plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 29th day of May, A. D. 1916, and of the Independence of the United States the one hundred and fortieth.

BOURQUIN,

United States District Judge.

Service of the foregoing citation acknowledged and copy thereof received this 29th day of May, A. D. 1916.

SIDNEY M. LOGAN,

JAMES M. BLACKFORD,

W. H. POORMAN,

Attorneys for Defendant in Error.

[Endorsed]: #395. In the District Court of the United States, for the District of Montana. Lincoln County, Plaintiff, vs. National Surety Company, a Corporation, et al., Defendants. Citation on Writ of Error. Filed May 29th, 1916. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy.

Thereafter, on June 20, 1916, Praeceptum for Transcript was duly filed herein, in the words and figures following, to wit:

*In the District Court of the United States for the
District of Montana.*

LINCOLN COUNTY,

Plaintiff,

vs.

NATIONAL SURETY COMPANY, a Corporation,
et al.,

Defendants.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to writ of error allowed in the above-entitled cause, and to incorporate into such transcript of record the following papers, to wit:

1. Judgment-roll.
2. Bill of Exceptions of Defendant National Surety Co.
3. Assignment of Errors of Defendant National Surety Co.
4. Stipulation Waiving Supersedeas Bond.
5. Petition of Defendant National Surety Co., for Writ of Error and Supersedeas, and Allowance of Same.
6. Bond on Appeal.
7. Writ of Error.
8. Citation on Writ of Error.

Request is further made that the same be duly certified by you as required by law and the rules of court.

CLARENCE H. GILBERT,
GUNN, RASCH & HALL,

Attorneys for Defendant National Surety Company.

Filed June 20, 1916. Geo. W. Sproule, Clerk.

Thereafter, on June 24, 1916, an Order Enlarging Time to File Record on Appeal was duly entered herein, in the words and figures following, to wit:

*In the District Court of the United States, in and for
the District of Montana.*

LINCOLN COUNTY,

Plaintiff,

VS.

NATIONAL SURETY COMPANY et al.,

Defendants.

**Order Extending Time to July 8, 1916, to File
Record.**

Good cause being shown therefor, it is ordered that the time for filing the transcript on writ of error herein, in the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby, extended to and including the 8th day of July, A. D. 1916.

BOURQUIN,
Judge.

Dated June 24, 1916.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 123 pages numbered consecutively from 1 to 123 inclusive, is a full, true and correct transcript of the pleadings, process and judgment and other proceedings had in said cause, mentioned in the praecipe for transcript of record therein, and of the whole thereof, as appears from the original records and files of said court in my custody as such clerk; and I do further certify and return that I have annexed to said transcript and included within said paging the original Writ of Error and Citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Fifty-seven 20/100 Dollars (\$57.20), and have been paid by the plaintiff in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said United States District Court for the District of Montana, at Helena, Montana, this 28th day of June, A. D. 1916.

[Seal]

GEO. W. SPROULE,

Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
6/28/16.]

[Endorsed]: No. 2825. United States Circuit Court of Appeals for the Ninth Circuit. National Surety Company, a Corporation, Plaintiff in Error, vs. County of Lincoln, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed July 3, 1916.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the District Court of the United States for the
District of Montana.*

LINCOLN COUNTY,

Plaintiff,

vs.

NATIONAL SURETY COMPANY, a Corporation,
et al.,

Defendants.

**Order Enlarging Time to File Record and Docket
Cause to July 25, 1916.**

Upon application of defendant National Surety Company for good cause shown it is hereby ordered that the defendant National Surety Company need not file record or docket case in the Circuit Court of Appeals until twenty days from this date and its

time is extended until the expiration of said twenty days.

Dated this 5th day of July, 1916.

BOURQUIN,
Judge.

[Endorsed]: No. 395. In the District Court of the United States for the District of Montana. Lincoln County, Plaintiff, vs. National Surety Company, a Corporation, et al., Defendants. Order. Entered July 6, 1916.

No. 2825. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 10, 1916. F. D. Monckton, Clerk.